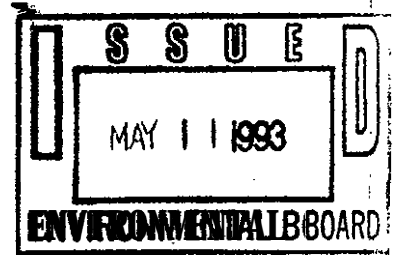


VERMONT ENVIRONMENTAL BOARD  
10 V.S.A. Chapter 151



Re: Marcel Roberts and Noel Lussier  
Declaratory Ruling #239

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, issued pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule 3(D), pertains to a declaratory ruling petition regarding a seven-lot subdivision located in Irasburg. As is explained below, the Board concludes that a permit was and is required for the subdivision pursuant to 10 V.S.A. Chapter 151 (Act 250) because the individuals who created the subdivision were affiliated within the meaning of 10 V.S.A. § 6001(14)(A)(iii) with other individuals who had within the previous year created more than ten lots within Environmental District #7.

I. SUMMARY OF PROCEEDINGS

On January 16, 1990, former District #7 Coordinator Cynthia Cook issued Advisory Opinion #7-072 regarding the subdivision of the so-called "Cotnoir/Ryan" property in Irasburg. The property is an approximately 104-acre tract. The opinion concludes that an Act 250 permit is required for seven lots created on the tract because of the involvement of Marcel Roberts and Noel Lussier (the Petitioners).

The Petitioners appealed the District Coordinator's opinion to the Executive Officer pursuant to Board Rule 3(C). On December 5, 1990, Executive Officer Stephanie J. Kaplan issued Advisory Opinion #EO-90-201, affirming the District Coordinator's opinion.

On December 31, 1990, the Petitioners filed a petition for declaratory ruling with the Board pursuant to Rule 3(C). On January 31, 1991, the Board issued and published a Notice of Declaratory Ruling Petition, directing that all parties who wished to participate file statements of interest and submissions identifying the issues and facts in controversy and the parties' proposed witnesses and exhibits. In response to this notice, the Petitioners and the State of Vermont Agency of Natural Resources filed statements.

On February 27, 1991, Chair Elizabeth Courtney issued a memorandum concerning the submissions made by the parties. The memorandum included a statement that the issue in this matter will be whether there is Act 250 jurisdiction over the subdivision in question and that the Board will consider that issue de novo.

CORRECTED

DR 239

On April 4, 1991, Chair Courtney issued a memorandum setting a schedule for filing of prefiled testimony and holding a hearing. Prefiled testimony was to be due on May 20 and a hearing held on June 20.

On May 17, 1992, the Agency filed a request for waiver of the prefiled testimony deadline on the grounds that it planned only to cross-examine the Petitioners' witnesses. No party filed prefiled testimony.

On June 4, 1991, Assistant Executive Officer Aaron Adler notified Petitioners that the June 20 hearing was being cancelled because no testimony had been filed and that the Board would consider dismissing the matter. On June 19, the Petitioners filed prefiled testimony and an objection to dismissal.

On July 2, 1991, the Board issued a memorandum of decision, declining to dismiss this matter and setting it for hearing on December 12, 1991.

On November 13, 1991, the Chair issued a memorandum stating that the Board will take notice of various documents identified in the memorandum and offering parties an opportunity to file supplemental prefiled testimony. In the memorandum, the Chair stated that the hearing will be on December 11 rather than December 12.

On December 3, 1991, the Chair issued subpoenas to witnesses whose testimony she believed may be relevant and who were not being called by the parties.

On December 10, 1991, the Petitioners filed a motion for continuance on the ground that one of them was not available for the scheduled hearing.

On December 11, 1991, the Assistant Executive Officer sent the Petitioners a letter confirming telephone discussions which occurred between him and the Petitioners' attorney on December 10. As stated in the letter, the Chair had denied the motion for a continuance on the ground that this matter has been pending for a long time and needed to be resolved. Subsequently, the Petitioners orally requested to withdraw the proceedings in order to discuss settlement. The Chair agreed to postpone the hearing and continue the matter to allow for negotiation concerning entry into an Assurance of Discontinuance pursuant to 10 V.S.A. § 8007.

Negotiations occurred but did not result in an agreed-upon Assurance. In May 1992, the Petitioners' attorney withdrew as counsel. The Board has received no further communication from the Petitioners or the Agency concerning this matter.

In early 1993, the Chair reviewed this matter and determined that the prefiled testimony filed by the Petitioners appears to establish that there is Act 250 jurisdiction over the subdivision. Accordingly, pursuant to Rule 3(D), she determined to issue a preliminary ruling to that effect. In connection with the preliminary ruling, pursuant to Rule 20, the Chair obtained and took notice of various property tax returns and deeds filed in town records with respect to the subdivision.

A proposed decision was sent to the parties on March 11, 1993, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. Along with the proposed decision, the Chair issued a memorandum listing those documents being noticed. No party submitted objections to the proposed decision or requested the opportunity for oral argument. The Board deliberated concerning this matter on April 21, 1993. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

## II. ISSUE

Whether, pursuant to 10 V.S.A. §§ 6001(14), (19) and 6081(a), an Act 250 permit was required prior to the sale or offer for sale of any interest in, or commencement of construction on, the seven so-called "Cotnoir-Ryan" lots located in Irasburg.

## III. FINDINGS OF FACT

1. On September 15, 1988, the District #7 Commission issued Land Use Permit #7R0685 to Petitioner Roberts and Omer Choquette, authorizing the creation of a 12-lot subdivision in Derby, Vermont.
2. On June 28, 1989, Petitioner Roberts entered into a deposit receipt and sales agreement (the agreement) with William and Doris Ryan (the Ryans). The agreement concerned an approximately ~~104-acre~~ tract of land (the tract) in Irasburg, Vermont. The sales agreement states that the tract was to be surveyed and deeded into at least five lots. The total price was to be \$105,000. The Ryans would sell the lots to the Petitioners.

3. Petitioner Roberts and the Ryans did not own the tract when they signed the agreement. At that time, Marcel and Pauline Cotnoir (the Cotnoirs), the parents of Doris Ryan, owned the tract.
4. The Cotnoirs sold the tract to the Ryans on July 31, 1989 for \$98,000.
5. Brow Surveying Company, Inc. created a survey map (#8920) of the tract dated August 1989 depicting seven lots on the tract. After the map was created, it was recorded on the Irasburg land records.
6. On August 10, 1989, the Ryans conveyed the tract to the Petitioners in seven deeds. The lots sold were those depicted on the August 1989 survey by Brow Surveying, Inc. The sale price for each lot was as follows:

Lot #1 -	10.21 acres	\$9,000.00
Lot #2 -	10.29 acres	\$9,000.00
Lot #3 -	10.68 acres	\$9,000.00
Lot #4 -	10.10 acres	\$9,000.00
Lot #5 -	10.02 acres	\$9,000.00
Lot #6 -	0.92 acres	\$30,000.00
Lot #7 -	54.0 acres	\$30,000.00

The total price for all seven lots was \$105,000.

7. On August 25, 1989, the Petitioners sold Lot #7 to K. and C. Golden for \$31,000.
8. On August 29, 1989, the Petitioners sold Lot #5 to M. and M. Pietras for \$14,000.
9. On September 1, 1989, the Petitioners sold Lot #1 to J. and J. White for \$14,000.

#### IV. CONCLUSIONS OF LAW

Under 10 V.S.A. § 6081(a), an Act 250 permit is required prior to sale or offer for sale of any interest in, or commencement of construction on, a subdivision. 10 V.S.A. § 6001(19) defines "subdivision" to mean:

[A] tract or tracts of land, owned or controlled by a person, which the person has partitioned or divided for the purpose of resale into 10 or more lots within a radius of five miles of any point on any lot, or within the jurisdictional area of the same district commission, within any continuous period of five years. In determining the number of lots, a lot shall be counted if any portion is within five miles or within the jurisdictional area of the same district commission.

10 V.S.A. § 6001(14)(A) states in relevant part that “person”:

(i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership; ...

(iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land;

Under these authorities, an individual may be attributed lots if one of the following two statements is true: (a) the individual partitioned or divided the relevant land into lots (or plans to do so), or (b) the individual is affiliated with another individual who partitioned or divided the relevant land into lots (or plans to do so), provided that the affiliation is for profit, consideration, or beneficial interest derived from the partition or division. See Re: Stevens & Gyles, Declaratory Ruling #240 (May 8, 1992).

The Board's inquiry into whether these statements are true begins with a determination of when the relevant lots were partitioned or divided. In relevant part, Board Rule 2(B) provides:

A subdivision shall be deemed to have been created with the first of any of the following events.

(1) The sale or offer to sell or lease the first lot within a tract or tracts of land with an intention to sell, offer for sale, or lease 10 or more lots. A person's intention to create a subdivision may be inferred from the existence of a plot plan, the person's statements to financial agents or potential purchasers, or other similar evidence;

(2) The filing of a plot plan on town records;

(3) The sale or offer to sell or lease the tenth lot of a tract or tracts of land, owned or controlled by a person, when the lot is within an environmental district or within a five mile radius of any point on any other lot created by that person within any continuous period of five years after April 4, 1970.

The Board previously has stated that this portion of Rule 2(B) interprets the words "partitioned" and "divided" as used in 10 V.S.A. § 6001(19). Re: Black Willow Farm, Declaratory Ruling #202 at 8 (June 30, 1989).

Applying Rule 2(B) to the facts of this matter, it is clear that, of the three events listed in the rule, the first that occurred in this case was the filing of a plot plan on the Irasburg land records sometime after the plan was created in August 1989. Accordingly, the seven lots on the tract were created no earlier than August of that year.

Well before that date, the Petitioners and the Ryans executed a deposit receipt and sales agreement in which the Ryans promised to sell the tract to the Petitioners in no less than five lots. The Ryans did not own the tract at the time the agreement was executed; the Cotnoirs did. Thus, the Petitioners and the Ryans executed an agreement regarding conveyance of the tract in lots at a time when none of the parties to the agreement owned the tract.

Acting on this agreement with the Petitioners, the Ryans then purchased the land from the Cotnoirs, divided it into seven lots, and conveyed the lots to the Petitioners. The Ryans received \$7,000, profit from the sale of the seven lots. The Petitioners received the consideration and beneficial interest of owning divided land and profit from lot sales.

Based on the foregoing, the Board concludes that the Petitioners and the Ryans were and are one person with respect to the lots created at the tract under 10 V.S.A. § 6001(14)(A)(iii). Accordingly, because Petitioner Roberts had already created more than ten lots within Environmental District #7 within five years, an Act 250 permit was required prior to the sale or offer for sale of any interest in, or commencement of construction on, the tract, and remains required. Consequently, Act 250 required that a permit be obtained prior to the sales of Lots 1, 5, and 7 by the Petitioners as detailed in the findings, above.

Marcel Roberts and Noel Lussier  
Findings of Fact, Conclusions of Law, and Order  
D.R. #239  
Page 7

---

V. ORDER

1. An Act 250 permit was required prior to the sale or offer for sale of any interest in, or commencement of construction on, the seven lots on the so-called "Cotnoir/Ryan" tract, and remains required prior to any further such sale, offer for sale, or commencement of construction.

2. Act 250 required that a permit be obtained prior to the sale of Lots 1, 5, and 7 at the tract by the Petitioners.

ENVIRONMENTAL BOARD



Elizabeth Courtney, Chair

Darby Bradley

Terry Ehrich

Lixi Fortna

Arthur Gibb

Anthony Thompson

Steve E. Wright

c:\pah\appeals\roberts.dec